NO. 04-413

Supreme Court, U.S.
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In The Supreme Court of the United States

CITY OF ALBUQUERQUE,
A MUNICIPAL CORPORATION, *et al.*,

Petitioners,

v.

RICK HOMANS; SANDER RUE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

I. Whether campaign spending limits imposed by the City of Albuquerque violate the First Amendment.

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Statement of the Case

Petitioners in these cases seek to re-open a long settled issue: whether candidate spending limits violate free speech and association rights under the First Amendment. For most of the twenty-eight years that have passed since this Court struck down similar limits on federal candidates in *Buckley v. Valeo*, 424 U.S. 1 (1976), Albuquerque has been the only American jurisdiction to enforce such limits.

I. Proceedings Below

Rue does not dispute Petitioner's account of the proceedings below. However, it is important to note that both the records and the procedural posture of these two cases differ substantially. They were not consolidated at any point in prior proceedings, and in the district court were even decided by different judges. In *Homans*, the district court ruled against spending limits following a bench trial that consisted largely of the submission of affidavits and expert reports by the City. Since the Plaintiff did not cross examine these experts or submit his own expert reports, the record in that case is rather one-sided. In contrast, *Rue* was decided on a summary judgment record that included the cross-examination of most of these experts in depositions, as well as analysis by the Plaintiff's own experts that filled in some of the gaps left by the City's evidence.

While these differences are immaterial to the Tenth Circuit's principal holding that campaign spending limits simply cannot survive appropriate scrutiny, they could become important under a more fact intensive analysis such as that employed by Judge Lucero in his concurrence below. Indeed, the very different factual conclusions drawn by Judge Lucero and his colleagues in the Tenth Circuit decision and by the district court opinion of Judge Vazquez in the *Homans* case can be almost entirely explained by the different records compiled in the two cases as many of the factual findings made by Judge Vazquez were revealed by the *Rue* record to be based upon misleading, incorrect, or inapplicable information.[1]

For example, the *Homans* district court errantly found that Albuquerque's turnout was higher than the average. *Homans v. City of Albuquerque*, 217 F. Supp. 2d 1197, 1201 (D.N.M. 2002). The City originally submitted similar data in *Rue*, App. 0441-0442[2] (Gierzynski dep.), but this data ultimately turned out to be badly flawed because it compared Albuquerque's turnout as a percentage of registered voters to a national average based upon voting age population. App. 0209-0210 (Coleman supp. decl.). Like other statistics compiled by the City's experts, this statistic also excluded most council-only elections while including mayoral

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1 There was also some evidence submitted by the City in *Homans* but not in *Rue*. Most notably, then-Mayor Jim Baca's testimony was not submitted at any point in the *Rue* litigation.

2 All citations to the appellate record in this brief are to the *Rue* record.

recounts with few or no council candidates on the ballot. See App. 0208, 0211 (Coleman supp. decl.).

Similarly, findings made by the *Homans* district court regarding comparisons of contributions in Cincinnati and Albuquerque turned out to be inapplicable to the council races at issue here. *See Homans*, 217 F. Supp. 2d at 1201. While the City did submit a report that claimed contributors of $1,000 or more had contributed 53% of Cincinnati funds but only 27% of Albuquerque campaign funds, App. 0621 (Makinson report), these differences were largely explained by differences in contribution limits and donor bases in the two cities. For example, Albuquerque's contribution limits prohibited contributions of that size entirely from its council candidates, and also capped contributions at approximately $4,000 in mayoral races. App. 0313, 0317-0318 (Makinson dep.). In contrast, Cincinnati's lack of any contribution limits at that time enabled donors to make "about a hundred contributions" over $4,000, including fifty contributions of $10,000 or more. App. 0313 (Makinson dep.). These $10,000+ contributors alone contributed a minimum of $500,000 to Cincinnati campaigns–more than triple what Albuquerque's entire city council was allowed to spend. The statistics also reflected Cincinnati's larger base of big campaign donors as the report's author conceded that donors in Cincinnati had also made more large contributions in federal campaigns than had their Albuquerque counterparts. App. 0314-0315 (Makinson dep.).

Finally, the *Homans* court errantly found that candidates subject to spending limits spend more money on actual vote contact. *Id.* at 1201. While there was evidence that they spend a higher percentage, Albuquerque council candidates actually spent far less on voter contact than their counterparts elsewhere. For example, the City's expert, Dr. Anthony Gierzynski claimed that candidates in comparably sized California cities spent only 50% on voter contact compared with 75% in Albuquerque, App. 0448-0449, 0458 (Gierzynski rep.), but he also found that those California candidates spent $8.46 per vote while Albuquerque candidates spent only $2.12 in council elections. App. 0445 (Gierzynski rep.) Applying Dr. Gierzynski's voter contact percentages reveals that California candidates spent $4.23 on voter contact while Albuquerque council candidates spent only $1.59 per vote - less than half of what their California counterparts spent contacting voters.

II. Factual Background

Article XII, Section 4(d)(1) of the City of Albuquerque Charter prohibits candidates for city council from accepting contributions or making expenditures equal to twice the amount of the annual salary paid by the City of Albuquerque to Councillors as of the date of filing of the Declaration of Candidacy. During the most recent election, held October 2, 2001, spending was thereby limited to $17,056, and the average council district contained 26,128 registered voters. App. 0431 (2001 Certificate of Canvass). As a qualified candidate for District 5 Councilor of the City of Albuquerque, Rue spent a total of $25,724.17. App.

0168-0169 (Rue aff.). Had Rue not been protected by a preliminary injunction, he would have had to forego at least three direct mailings, thereby preventing him from effectively advocating his message to many prospective constituents. App. 0013-0015 (Verified Complaint).

As a result of this limit, candidates for the Albuquerque city council spend far less than candidates for city councils in comparable cities, App. 0445 (Gierzynski rep.) or for seats in the New Mexico legislature that represent fewer people than Albuquerque councillors. App. 0221-0222 (McCleskey rep.); App. 0275-0276 (Mayer dep.).

Because they are permitted to spend so little, most city council candidates make little or no effort to communicate with most potential voters and instead focus their efforts on those who are regarded as most likely to vote. E.g. App. 0221 (McCleskey rep.); App. 0378, (Feldman dep.); App. 0369 (Reed dep.). Counsel candidates therefore typically send direct mail to only 2,000-8,000 households while state senate candidates running in smaller districts without limits typically mail to 12,000-15,000, and state house candidates running in much smaller districts mail to 6,000-10,000. App. 0222 (McCleskey rep.). Legislative candidates in Albuquerque have also been able to communicate through mediums such as radio and billboards that have been effectively prohibited to city council candidates. App. 0221 (McCleskey rep.).

This limit was imposed in 1974 after being approved by the voters as part of a new charter that gave Albuquerque home rule status and transformed its government from a commission-manager system with commissioners elected at large to a council-mayor system in which councillors were selected by districts. App. 0744-0745 (Cottrell dep.).

Although Albuquerque has been the only major American city to impose spending limits on council candidates during the past quarter century, the record in this case failed to identify any substantial benefit that has been caused by spending limits. Voter turnout in council races has been poor, averaging only 17% of voting age population (VAP) voting in council races held concurrent with a mayoral election, and only 13% when there is no mayoral race on the ballot. App. 0209-0211 (Coleman supp. dec.). Turnout in mayoral races has been somewhat higher, but still towards the lower end of the range of turnout experienced by cities across the country. 0208-0212 (Coleman supp. dec.).

Competition in Albuquerque council races has been similar to that experienced nationally, with various compilations of Albuquerque's incumbent retention rate being calculated at 72.7%-94.5% compared with national data ranging from 81.8%-86.1% depending upon the years and cities included in the data set, and the methodology used to calculate re-election rates. See App. 0183-0184 (Coleman rep.), App. 0205-0208 (Coleman supp. dec.), App. 0820-0821(Gierzynski rebuttal report).

Although the City provided a number of anecdotes, polling data, and newspaper articles to support its various theories of justification, none of these showed Albuquerque to be significantly better than other U.S. cities that have not had spending limits.

Argument

The Tenth Circuit in this case struck down the candidate spending limits imposed by the City of Albuquerque for two basic reasons: (1) as explained by Judge Tymkovich for the majority, "all three of the asserted interests are thus constitutionally incapable of justifying spending restrictions as a matter of law;" *Homans v. City of Albuquerque*, 366 F.3d 900, 914-15 (10th Cir. 2004); and (2) even if the asserted interests could theoretically justify a spending limit, "Albuquerque's evidence, even when viewed in the light most favorable to the City, fails to establish that its candidate-expenditure limits are necessary to serve a compelling state interest." *Id.* at 913. Hence Judge Lucero, who largely agreed with the City's legal theories and therefore did not join Judge Tymkovich's opinion, nonetheless held the limits to be unconstitutional due to the inadequacy of the City's record. *Id.* Since both of his colleagues joined Judge Lucero's factual analysis, this aspect of his opinion is therefore an alternative holding of the panel.

This decision is therefore a poor candidate for this Court's review not only because of its consistency with well established precedence from this Court and others, but also because the City has failed to meet its factual burden even under its own legal theories.

Although a panel of the Second Circuit has recently expressed its disagreement with Judge Tymkovich's majority analysis in this case, *See Landell v. Sorrell*, 382 F.3d 91, 2002 U.S. App. LEXIS 28171 (2nd Cir. Aug. 7, 2004); there is little difference between the legal analysis applied in that case and that employed by Judge Lucero. That the Second Circuit panel found that Vermont had proven that its spending limits served compelling interests while the Tenth Circuit per Judge Lucero's opinion found that Albuquerque's did not is attributable to differences in the records between the two cases. Because both Judge Tymkovich and Judge O'Brien joined Judge Lucero's factual analysis as well as Judge Tymkovich's legal analysis, their decision should be affirmed even under the legal theories proffered by the City and espoused by Judge Lucero and the Second Circuit.

I. The Unconstitutionality of Campaign Spending Limits Is Well Established.

The Tenth Circuit decision in this case follows the unwavering precedence of this Court. For nearly thirty years, this Court has consistently regarded campaign spending limits as unconstitutional restraints on free speech. As it recently described its approach to the subject, "we have routinely struck down limitations on independent expenditures *by candidates*, other individuals, and groups . . ." *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 441 (2001) ("Colorado II")(emphasis added). This "routine" began with the landmark case of *Buckley*, 424 U.S. 1 (1976), in which this Court applied strict judicial scrutiny and held that limits on spending impose constitutionally

impermissible restraints on speech and association that are not justified by any compelling state interest. *Id.* at 54-58. Accordingly, this Court struck down limits on candidate campaign expenditures, on independent expenditures by non-candidates, and on candidate expenditures from personal funds. *Id.* at 58. Since *Buckley*, this Court has also struck down restraints on spending imposed on political action committees, *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), political parties, *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("Colorado I"), nonprofit corporations, *FEC v. Massachusetts Citizens for Life, Inc.* 479 U.S. 238 (1986) ("MCFL"), and business corporations. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).[3] Beginning with its initial review of spending restraints, the Supreme Court has utilized universal language to broadly condemn spending limits, "the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy" whether the money is his own funds or legal contributions. *Buckley*, 424 U.S. at 54. It did not evaluate the evidentiary support for the interests presented as justifications for the spending limit, but simply found

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[3] Some restrictions on corporate and union expenditures have since been upheld as restrictions on the organizational form that protected the rights of dissenting shareholders and union members. Critical to the constitutionality of such restrictions has been this Court's finding that these restrictions, unlike other spending limits, they did not directly restrain speech because "[t]he ability to form and administer separate segregated funds . . . has provided corporations and unions with a constitutionally sufficient opportunity" to make the desired communications. *McConnell v. FEC*, 124 S. Ct. 619, 694 (2003).

that "[n]o governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression." *Id.* at 55.

No Supreme Court Justice since *Buckley* has ever described the Court's approach to candidate spending limits as anything but absolute, and even those Justices who have expressed sympathy for some spending limits have nonetheless acknowledged that upholding such limits would require a change from the current state of the law. *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 405 (2000)(Breyer, J., concurring)(arguing that the Court should find a way "to reinterpret aspects of Buckley in light of the post-Buckley experience . . . particularly in respect to independently wealthy candidates, whose expenditures might be considered contributions to their own campaigns.").

Following this Court's clear lead, lower court decisions have also repeatedly refused to uphold campaign spending limits. *See, e.g. Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998) (affirming injunction against enforcement of state spending limits on candidates for judicial office); *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998) (striking down limits on candidate spending in city council elections); *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996) (striking down state limit on independent expenditures); *Service Employees Int' Union v. Fair Political Practices Comm'*, 955 F.2d 1312, 1322 (9th Cir. 1992) (striking state ban on intra-candidate transfers as an unconstitutional limitation on expenditures); *Lincoln Club of Orange County v. City of*

Irvine, 292 F.3d 934 (9th Cir. 2002) (striking limit on contributions to independent expenditure committee).

The only existing court decision to have read *Buckley* as anything but a final decision against the constitutionality of campaign spending limits is the Second Circuit's recent decision in *Landell v. Sorrell*, 382 F.3d 91, 2002 U.S. App. LEXIS 28171; in which it found that Vermont's candidate spending limits served compelling interests in "preventing the reality and appearance of corruption, and protecting the time of candidates and elected officials," and remanded to the district court for determination of whether the limits were narrowly tailored. *Id.* at 87, 122-125. Judge Winters dissented from this portion of the decision, eloquently explaining in a lengthy dissent how the panel decision misread this Court's decision in *Buckley*. *Id.* at 170-346 (Winters, J., dissenting). A petition for rehearing and rehearing en banc is pending in that case.

II. This Court has Already Rejected Each of the City's Alleged Justifications for Campaign Spending Limits.

Each of the interests proffered by the City as justification for its spending limit must fail both under the weight of precedent and upon the force and logic of the strict scrutiny standard. Two such interests are suggested: (1) "Deterring the reality and appearance of corruption" Cert. Petition at 17; and (2) Preserving the time of officeholders and candidates." Id. at 21. Each has been addressed and rejected by this Court.

The anti-corruption rationale was explicitly rejected by this Court in *Buckley*. Although it noted candidate dependence on large campaign contributions was "the major evil associated with rapidly increasing campaign expenditures," it rejected the "interest in alleviating the corrupting influence of large contributions" as a support for spending limits because it was "served by the Act's contribution limitations and disclosure provisions rather than by . . . campaign expenditure ceilings." *Buckley*, 424 U.S. at 55. Far from ignoring the potential for an interest group "bundling" together numerous contributions, the Court actually pointed to the potential for "substantial contributions to candidates by some major special-interest groups through the combined effect of individual contributions from adherents" as an important palliative for the threat to speech and association rights posed by contribution limits. *Id.* at 28 n. 31.

While the time-saving argument was not rejected in quite as explicit a fashion as was the anti-corruption justification, it was rejected nonetheless. As Judge Winters, who as an attorney argued *Buckley v. Valeo* to this Court, has explained, "the arguments regarding the time politicians spend fundraising were . . . known and made before the Supreme Court in Buckley." *Landell*, at 277 (Winters J., dissenting). Specifically, "The time-protection argument was relied upon by the Court of Appeals in Buckley in upholding the statute . . . and was mentioned by the Supreme Court itself" besides figuring prominently in several briefs submitted in that case, including that of the Attorney General and Solicitor General. *Id.* at 278.

Moreover, this justification amounts to little more than a claim that the government must intervene to stop candidates from engaging in too much of the wrong kind of speech. The only way that spending limits can prevent an official from neglecting his duties is by prohibiting the official from making communications that the official considers to be so important that he is willing to neglect his duties in order to make them. If a government can limit how much a candidate spends to mail his message to constituents' homes, why could it not also (or instead) limit the total amount of time he spends campaigning each day?

Indeed, such a rule would be more closely tailored to the asserted interests because extra funds can actually save candidate time by allowing the hiring of paid staff to perform tasks that the candidates would otherwise need to do themselves. As Councillor Sally Mayer pointed out, "with the spending cap in place, it limits what you can do. You can't afford to really hire someone to help you do fund raising." App. 0267 (Mayer dep.). The City's own expert also explained that candidates in other jurisdictions frequently hire campaign managers because "a candidate might be so busy that they want someone else to handle a lot of the aspects of the campaign that the candidate might have to handle." App. 0333-0334 (Gierzynski dep.). Of course, there are also numerous alternative means of increasing the amount of time officeholders have available. The City could increase its contribution limits to allow candidates to raise more money from their existing donors. It could make the council a full-time position so that its member would not need to

maintain outside employment, increase the number of councillors to reduce the burden on each individual, or provide additional staff to allow them to attend to their official duties more efficiently. Unlike campaign spending limits, none of these alternative remedies would harm First Amendment rights, and some would even enhance them.

This Court has wisely rejected a variation of this proffered justification because "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Buckley*, 424 U.S. at 57. Rather, it has properly demanded that it is the "people individually as citizens and candidates . . . who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley*, 424 U.S. at 57. Restricting the speech of candidates is especially troublesome because "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Republican Party of Minnesota*, 536 U.S. 765, 781-782 (2002). It does not matter whether political campaigns spend too much from a public policy standpoint or whether the type and quantity of communications are optimal for advancing some governmental objective. Candidates and their supporters are not government policy engines but private citizens with First Amendment rights.

III. The Facts Do Not Support The City's Legal Theories.

Even if *Buckley*'s spending limits decision could be read as requiring a case-by-case factual review rather than the outright proscription followed by the Tenth and Sixth Circuits, the facts required to justify such a limit would at least need to exceed those available to this Court in *Buckley*. But such a record is not to be found in this case. Rather, as Judge Lucero explained for the panel below, "the Buckley evidence was of a far greater magnitude than that presented here and smelled of actual quid pro quo." *Homans*, 366 F.3d at 911. Similarly, "Albuquerque's evidence, even when viewed in the light most favorable to the City, fails to demonstrate that expenditure limits are necessary to further a compelling state interest in preserving officeholders' time." *Id.* at 913.

The paucity of the City's factual case also makes the result in this case fully consistent with the opinion issued by a panel of the Second Circuit in *Landell*, 382 F.3d 91, 2002 U.S. App. LEXIS 28171.[4] In that case, the panel found that "Vermont presented powerful evidence concerning the time pressures which the prospect of unlimited expenditures places on candidates for office" *Id.* at 79. Even so, the panel stopped far short of declaring Vermont's limits constitutional and instead remanded to the district

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[4] A petition for re-hearing or re-hearing en banc was filed in the *Landell* case on September 1, 2004. Hence, the panel's analytical departures from the decisions of the Tenth and Sixth Circuits may yet be resolved by the Second Circuit without need for action by this Court.

court for determination of the critical narrow tailoring issue. *Id.* at 122-125. It has ordered the district court to consider not only whether the *type* of limit is the least restrictive means to achieve the state's objectives, but also whether the limits are lower than necessary. *Id.* Hence, it is entirely possible and even likely that the Vermont spending limits will ultimately be struck down either in the district court or by the Second Circuit on an appeal from the remand. Indeed, the Second Circuit's analysis shows that the limit here would need to clear an additional hurdle beyond those that doomed it in the Tenth Circuit - whether they are lower than necessary.

Nor does the record in this case suggest a need to reverse the basic holding of *Buckley* against spending limits. Indeed, it affirms the wisdom of this Court in determining that there was no compelling interest served sufficiently by spending limits that could justify their harm to First Amendment rights. Because of Albuquerque's unique history of running campaigns under spending limits for a quarter century, any sizable benefit from spending limits should by now be readily apparent. If spending limits were the powerful and necessary antidote to corrupt politicians, unfair elections, disillusioned voters, and overworked officials that the City claims, their fruits ought to be readily apparent by now. If unlimited campaign spending is the disease that ails the American political system, Albuquerque's city elections and politics should stand out as objectively and demonstrably better than the numerous comparable systems that have not been subject to spending limits. Instead, the evidence suggests that Albuquerque's politics and

elections are typical at best, with no substantial benefit shown to result from limiting the campaign spending of city council candidates.

Indeed, most of the City's evidence is not about Albuquerque at all, or even about other cities. Instead, the City seeks to re-litigate *Buckley* by asserting a supposed need for spending limits in Presidential and congressional races at the federal level. Cert. Petition at 17-18. But this case is about municipal spending limits on city councillors, not federal limits on congressmen. If Congress decides that a renewed effort to enact spending limits would be constitutional, it can enact such limits and an ensuing challenge would be the proper forum for this Court to evaluate the need for such limits at the federal level.

Here, the obvious comparison for evaluating the impact of the Albuquerque limits would be the experiences of similar cities, but the City alludes to such evidence in only a single paragraph in its recitation of facts, Cert Petition at 4-5, and not at all in its legal arguments. As illustrated by the facts recited in the Proceedings Below and Factual Background sections of this brief, supra at 2-5, the City's conclusory descriptions of this evidence are dubious at best. The lone undisputed "fact" cited by the City is that Albuquerque mayoral elections have seen unusual success by challengers. Cert Petition at 5 n.3, *see* App. 0440 (Gierzynski rep.). However, the failure of any Albuquerque mayor to ever win re-election in over a quarter-century of spending limited campaigns actually undermines any claim that such limits enhance faith in government.

Finally, the issue of campaign spending limits is one that is well settled with little clamor for change. Although twenty-eight years have passed since this Court's decision in *Buckley*, the City is able to point to only four jurisdictions that have sought to impose spending limits during that time: the Albuquerque limits established before *Buckley*, two Ohio jurisdictions that established limits in 1995, and the Vermont limits at issue in *Landell*. Cert. Petition at 27. While other jurisdictions may have been dissuaded from enacting such limits by this Court's clear ruling in *Buckley*, it can hardly be doubted that many more jurisdictions would have risked legal challenge if there truly was a compelling governmental interest that could only be satisfied by campaign spending limits.

Conclusion

The Tenth Circuit's decision is fully consistent with longstanding and continuous precedent from this Court, as well as that of most of its sister Circuits. Moreover, the underlying facts would not support a reversal of its decision even under the standard adopted by a panel of the Second Circuit in *Landell*, 382 F.3d 91, U.S. App. LEXIS 28171, which is the only existing decision ever to read this Court's holding in *Buckley v. Valeo* as anything but an outright prohibition against candidate spending limits. The City's petition should therefore be denied.

Respectfully submitted,

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